Headquarters U.S. Air Force

Integrity - Service - Excellence

Organizational Conflicts of Interest in Services Contracts

James E. Durkee, YA-03
SAF/GCQ
June 17, 2009

U.S. AIR FORCE

U.S. AIR FORCE

Acknowledgement

Daniel I. Gordon

Organizational Conflicts of Interest: A Growing Integrity Challenge

35 Public Contract Law Journal 25 (Fall 2005)

U.S. AIR FORCE

Why OCI Are Important Now

- **INDUSTRY CONSOLIDATION**
- **INCREASE IN CONTRACTING FOR ADVISORY AND ASSISTANCE SERVICES, AND OTHER PROFESSIONAL SERVICES**
- **INCREASED USE OF MULTI-AGENCY CONTRACTS**

What Is An OCI? [4,3,2…]

- **FOUR GENERAL RULES UNDER FAR § 9.505 (1988)**
  - **Systems Engineering and Technical Direction**
    - **FAR § 9.505-1**
  - **Preparing Specifications or Work Statements**
    - **FAR § 9.505-2**
  - **Providing Evaluation Services**
    - **FAR § 9.505-3**
  - **Obtaining Access to Proprietary Information**
    - **FAR § 9.505-4**

U.S. AIR FORCE

What Is An OCI? [4,3,2…]

- **THREE GROUPS FROM *Aetna Gov't Health Plans*, B-254397 (1995)**
  - **Biased Ground Rules**
  - **Unequal Access to Information**
  - **Impaired Objectivity**

U.S. AIR FORCE

What Is An OCI? [4,3,2…]

- **TWO OVERARCHING PRINCIPLES (FAR § 9.505(a) & (b))**
  - **Duty to the Government (BIAS ✉ USE RESTRICTIONS)**
  - **Fairness to Contractors (INFORMATION ✉ USE FIREWALLS)**

U.S. AIR FORCE

CO Responsibilities

- **Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible. (FAR § 9.504(a))**
- **Avoid, neutralize, or mitigate significant potential conflicts before contract award. (FAR § 9.504(a))**
- **Before issuing a solicitation for a contract that may involve a significant potential conflict, the contracting officer shall recommend to the head of the contracting activity a course of action for resolving the conflict. (FAR § 9.504(c))**
- **Notify the affected contractor and allow a reasonable time to reply. (FAR § 9.504(e))**
- **Obtain copies of contractor-to-contractor nondisclosure agreements and ensure their proper execution. (FAR § 9.505-4(b))**

U.S. AIR FORCE

Contractor Responsibilities

- **A contractor that gains access to proprietary information of other companies in performing advisory and assistance services must agree with the other companies to protect their information. (FAR § 9.505-4(b))**
- **Contractors should make inquiries of marketing consultants to ensure that the marketing consultant has provided no unfair competitive advantage. (FAR § 9.505-4(c))**
- **Through solicitation provisions and/or contract clauses, contractors can be directed to identify OCI and develop a proposed mitigation plan, but it is the Contracting Officer who must take action as set forth in FAR Subpart 9.5.**

Tools

- **BIAS versus INFORMATION**
  - **When BIAS is an issue, consider restrictions on contractor activities (*see e.g.*, *LEADS Corp.*, B-292465, Sept. 26, 2003, 2003 CPD ¶ 197)**
  - **When INFORMATION is an issue, consider using firewalls and non-disclosure agreements, or just disclose the information**
- **AFMC FARS Subpart 5309.5, related solicitation provision, contract clause, and IG5309.504**
- **AFSPC FARS Subpart 5309.5, related solicitation provision, and contract clause**
- **VAAR Subpart 809.5, and related solicitation provision**
- **DEAR Subpart 909.5, related solicitation provisions, and contract clause**

U.S. AIR FORCE

What's the Advantage?

- ***ARINC Engineering Services, Inc. v. United States*, 77 Fed.Cl. 196 (2007) (to make a case of unfair access to information, the protester must show that (i) the awardee had access to nonpublic information that was unavailable to the protester; (ii) the nonpublic information was competitively useful in responding to the solicitation; (iii) by having unequal access to that information, the awardee was afforded an advantage that was unfair; and (iv) not having equal access to that information prejudiced the protestor) *See id.* at 202.**

Government Misuse and Abuse of Contractor

- ***Spectrum Sciences and Software, Inc. v. United States*, 84 Fed.Cl. 716 (2008) An improper disclosure of proprietary information by an agency risks creating an organizational conflict of interest.**
  - **"By placing officials who had worked closely with Spectrum under the [contract by which proprietary information was accessed] onto the [unrelated requirement] procurement team, the Air Force paved the way for proprietary information from the former effort to leak (and eventually gush) into the latter. Use of this staffing, which, at the least, risked creating an organizational conflict of interest, gave the warnings made by several Air Force officials that [the procurement team] should not rely on anything that Spectrum had produced a decidedly hollow**

Alion Protest Sustained

- ***Alion Science & Technology Corporation*, B-297342, Jan. 9, 2006, 2006 CPD ¶ 1, and B-297022.3, Jan. 9, 2006, 2006 CPD ¶ 2**
  - **Awardee's conflicts of interest stemmed from performing services analysis, evaluation, and the exercise subjective judgment in formulating policies and regulations affecting the sale or use of products manufactured by the awardee or the awardee's competitors. Protest is sustained where record does not support the agency's assessment.**
  - **Bias ground rules.**

U.S. AIR FORCE

When Protest Corrective Action is a "Firewall" a Solution to Bias?

- ***Alion Science & Technology Corporation*, B-297022.3, Jan. 9, 2006, 2006 CPD ¶ 2**
  - **Agency's corrective actions remedied the prior procurement flaws by reasonably concluding that awardee's plan to perform conflicted portions of the contract through use of "firewalled" subcontractors will adequately avoid, neutralize, or mitigate the potential conflicts of interest.**
  - **How do you "firewall" bias? In reality, this was really a restriction on what the contractor could <u>do</u>, not on the <u>information</u> it had.**

Government Cannot Meet Responsibility by Transferring It

U.S. AIR FORCE

- ***Nortel Government Solutions, Inc.*, B-299522.5, B-299522.6, Dec. 30, 2008, 2009 CPD ¶ 10**
  - **Offeror was required to review and provide input on designs proposed by itself under separate contract with same agency.**
  - **Agency improperly adopted offeror's mitigation plan because it did not avoid, mitigate, or neutralize the OCI. The mitigation plan merely relied on agency's existing process that made government responsible for final decisions.**
  - **Agency must identifying and resolve integrity issues and organizational conflicts of interest**

Rule #1: Don't Embarrass Yourself or Your Agency

- ***Superlative Technologies, Inc.*, B-310489, B-310489.2, Jan. 4, 2008, 2008 CPD ¶ 12; and B-310489.4, June 3, 2008, 2008 CPD ¶ 123**
  - **Agency cancelled solicitation based on a potential "unfair advantage" provided to certain offerors as a result of the agency's disclosure of information to those offerors.**
  - **Agency subsequently sole-sourced the contract to a team that included one of the offerors *to whom the information was disclosed!***
  - **<u>Agency must identifying and resolve integrity issues and organizational conflicts of interest.</u>**

Government Cannot Meet Responsibility by Ignoring It

U.S. AIR FORCE

- ***AT & T Government Solutions*, B-400216, Aug. 28, 2008, 2008 CPD ¶ 170**
  - **Firm eliminated from competition due to perceived OCI.**
  - **But agency failed to (1) evaluate protester's proposed mitigation plan, (2) consider whether protester would actually be in a position to evaluate its own products, and (3) did not give protester notice of and an opportunity to respond to OCI findings prior to firm's disqualification.**
  - **<u>Agency must identifying and resolve integrity issues and organizational conflicts of interest.</u>**

Remote and Speculative

U.S. AIR FORCE

- ***Marinette Marine Corporation,*** **B-400697, B-400697.2,**
  B- 400697.3, Jan. 12, 2009, 2009 CPD ¶ 16
  - **Advice provided to awardee in preparing its proposal by entity that also assisted the agency in evaluating the proposals. It was OK, because…**
  - **The record showed that (1) the entity also provided advice to the protester, (2) any potential benefit to the entity is speculative and too remote (no financial interest), and (3) there is no reasonable possibility of prejudice because the entity was more critical of the awardee's proposal than it**

U.S. AIR FORCE

Personal Conflicts of Interest?

- ***Savannah River Alliance*, B-311126, B-311126.2, B-311126.3, B-311126.4, Apr. 25, 2008, 2008 CPD ¶ 88**
  - **Allegation: Organizational conflicts of interest exist due to the employment of several of the awardee's key personnel.**
  - **Denied: Any conflict, if it exists, is personal to the employees, and not the organization, and is too speculative to impute to their employers.**
  - **How do we deal with personal conflicts of interest?**

Another Personal Conflict?

U.S. AIR FORCE

- ***Detica*, B-400523, B-400523.2, Dec. 2, 2008, 2008 CPD ¶ 217**
  - **"Biased ground rules" protest denied!**
  - **Record showed that <u>former agency official</u> working for successful vendor had not participated in planning the acquisition or preparing the solicitation.**
  - **Note: Many statutes and regulations address ethics and Government employee conflicts.**

U.S. AIR FORCE

Related Topics

- **Inherently Governmental Functions**
- **Personal Services Contracts**

Personal Conflicts of Interest

- **Personal Conflicts of Interest**
  - **FAR Case 2007-017 (on hold until 2008-025 complete)**
  - **FAR Case 2008-025; NDAA FY09 Sec. 841 (OFPP reviewing draft proposed rule prepared by FAR Council analyst)**
  - **Making Gov't PCI Rules Apply to Contractors**
    - **Privacy Act, 5 U.S.C. § 552a (i) & (m)**
    - **IPA, 5 U.S.C. § 3374(c)(2)**
    - **ITEP, 5 U.S.C. § 3704(b)(2)**
    - **DOSAR 48 C.F.R. § 603.601**
  - **I8 USC 201 (bribery) versus 208 (conflicts of interest)**

U.S. AIR FORCE

What's on the Horizon?

Stay tuned!